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No. 85-156

In the Supreme Court of the United States

OCTOBER TERM, 1985

THOMAS B. HOOVER, ET AL., PETITIONERS

v.

ELIZABETH HANFORD DOLE, SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SPECIAL COURT, REGIONAL RAIL REORGANIZATION ACT OF 1973

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Secretary of Transportation exceeded her statutory authority by entering into a Memorandum of Intent to sell the United States' interest in Conrail on the express conditions that "appropriate arrangements" are made with respect to the interest of the Employee Stock Ownership Plan (ESOP) in Conrail and that Congress enact legislation authorizing the sale.

2. Whether the issue of the potential claims of the ESOP beneficiaries against the United States under the Tucker Act (28 U.S.C. 1491), in the event that (a) the necessary actions are taken to authorize the sale of Conrail contemplated by the Memorandum of Intent and (b) the sale has the result of under-compensating the beneficiaries, is ripe for adjudication at the present time.

3. Whether petitioners are entitled to appointment of an independent trustee to represent the interest of the ESOP in connection with the sale of Conrail contemplated by the Memorandum of Intent.

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OPINION BELOW

The opinion of the Special Court (Pet. App. 1a-22a) is reported at 613 F. Supp. 374.

JURISDICTION

The judgment of the Special Court was entered on July 9, 1985. The petition for a writ of certiorari was filed on July 26, 1985. The jurisdiction of this Court is invoked under 45 U.S.C. 1105(b).

STATEMENT

Petitioners, present and former employees of Consolidated Rail Corporation (Conrail), seek to challenge a recent Memorandum of Intent between the Secretary of Transportation and Norfolk Southern Corporation for the sale of Conrail.

1. In 1981, Congress enacted the Northeast Rail Service Act of 1981 (NERSA).[1] Under NERSA, respondent Secretary of Transportation was authorized and directed to arrange for the sale to the private sector of the interest of the United States in the common stock of respondent Conrail. 45 U.S.C. 761, 763.[2] This congressional directive was the result of Conrail's failure to become "a self-sustaining railroad system" notwithstanding the infusion of "many billions of dollars" by Congress. 45 U.S.C. 1101(1).[3]

On February 8, 1985, the Secretary and respondent Norfolk Southern Corporation (Norfolk Southern) entered into a Memorandum of Intent (MOI) for the sale of the United States' interest in Conrail. Under the MOI, Norfolk Southern has agreed to purchase the United States' interest for approximately $1.2 billion, to surrender certain net operating loss and investment tax credit carryforwards of

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[1]Subtitle E of Title 11 of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, §§ 1131-1168, 95 Stat. 643-687, codified in pertinent part at 45 U.S.C. 761-769c, 1101-1116.

[2]Under 45 U.S.C. 761(a)(2), the Secretary was authorized by Congress to submit a plan for the sale of the United States' interest in Conrail that would "ensure continued rail service; * * * promote competitive bidding for such common stock; and * * * maximize the return to the United States on its investment." The Secretary's efforts were also conditioned upon certain determinations concerning Conrail's profitability that were to be made by the Board of Directors of the United States Railway Association (USRA), the non-profit government corporation charged with oversight of Conrail. See 45 U.S.C. (& Supp. I) 711, 712, 763. As petitioners point out (Pet. 14-15), those determinations have all been favorable, thus authorizing the Secretary's efforts to sell Conrail.

[3]The financial difficulties of railroads and the rail transportation crisis of the early 1970s that led to enactment of the Regional Rail Reorganization Act of 1973 (the 3R Act), 45 U.S.C. (& Supp. I) 701 *et seq.*, under which Conrail was formed, have previously been reviewed by this Court in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 108-117 (1974).

Conrail, and to arrange to divest the combined Norfolk Southern/Conrail entity of certain rail tracks and facilities at closing to avoid possible antitrust concerns. See S. Rep. 99-98, 99th Cong., 1st Sess. 98, 105 (1985) (reprinting the Memorandum of Intent).

Of immediate relevance here, paragraph 2 of the MOI provides that "[a]t or prior to the Closing, [Norfolk Southern] or Conrail shall have made appropriate arrangements with respect to the employees of Conrail to accomplish * * * the acquisition by [Norfolk Southern] of such employees' 15% beneficial interest in Conrail." See S. Rep. 99-98, *supra,* at 98.[4] The MOI also includes an exhibit entitled "Summary of Buyer's Proposed Arrangements for Conrail Employees" that states that "Norfolk Southern will provide or cause to be provided cash or Norfolk Southern common stock in a total amount of $375 million, of which an amount determined to be the fair value of the assets and rights of the existing Conrail ESOP shall be contributed by Norfolk Southern to such ESOP." *Id.* at 122. Nothing in the

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[4]This language refers to the employees' interest in an Employee Stock Ownership Program (ESOP) originally authorized by Congress under Section 3 of the United States Railway Association Amendments Act of 1978, Pub. L. No. 95-565, 92 Stat. 2397, codified at 45 U.S.C. 726(f). To implement this provision, Conrail established a wholly owned subsidiary, Conrail Equity Corporation (CEC), to which it transferred 15% of the total outstanding number of Conrail shares (4.412 million) and received in return an equal number of CEC shares. Under the ESOP, Conrail, on the last day of each plan year beginning December 31, 1980, and continuing for ten years, is to contribute 10% of these CEC shares (441,200) to the ESOP. That amount is then immediately allocated by the ESOP trustee to the account of Conrail employees who have qualified for that year as ESOP beneficiaries. To date, Conrail has contributed 50% of the available CEC preferred stock for the benefit of five designated classes of beneficiaries. In 1991, if all the ESOP requirements have been met, the CEC preferred stock will be redeemed for the Conrail common stock or other comparable property held by CEC. Thus, at the present time, the ESOP has only a beneficial interest in Conrail common stock and does not hold any such stock itself.

MOI specifies the arrangements that are to be made concerning the employees' beneficial interest in Conrail or provides a mechanism for valuing that interest.

The MOI represents "an agreement in principle with respect to the major terms and conditions * * * [for the sale to Norfolk Southern of] the interest of [the United States] in the Common Stock of Conrail." S. Rep. 99-98, *supra*, at 97. It does not itself constitute a sales agreement, but instead expressly contemplates further "efforts to negotiate, execute and deliver a definitive agreement for the purchase and sale of the interest of [the United States] in the Common Stock of Conrail" (*ibid.*). Moreover, the proposed sale is explicitly conditioned on the "approval of Congress and the enactment of legislation with respect to the transactions contemplated [in the MOI]" (*id.* at 97-98), including in particular legislation "providing a mechanism for definitively valuing the existing Conrail employee stock ownership plan ('ESOP')" (*id.* at 104).

2. Petitioners brought this action for declaratory and injunctive relief in the Special Court established under the Regional Rail Reorganization Act of 1973. See 45 U.S.C. 719, 1105. The court granted summary judgment to respondents and denied petitioners' application for a preliminary injunction (Pet. App. 1a-22a).

First, with respect to the question whether the ESOP beneficiaries would have a Tucker Act claim (28 U.S.C. 1491) against the United States in the event that the sale to Norfolk Southern is completed and does not afford adequate compensation to them, the Special Court held that this issue was not ripe for adjudication (Pet. App. 7a-14a). Noting that "the MOI is not [an] all encompassing 'definitive agreement' for the sale of Conrail" (*id.* at 11a n.10), the court explained that any eventual sale—including

specifically the compensation provided for the ESOP's interest—was entirely dependent on the enactment of future legislation that Congress had not yet developed (*id.* at 12a & n.11). The issue of the availability of a Tucker Act remedy was thus premature "since legislation that would need to be considered in this regard has not yet been enacted (*id.* at 12a-13a (footnote omitted)). Moreover, because "there is no governmental action now in effect" that could give rise to the Tucker Act issue (*id.* at 11a (footnote omitted)), the court held that this case is distinguishable from the situations in *Dames & Moore* v. *Regan,* 453 U.S. 654, 689 (1981), and the *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 126 (1974). Finally, the court pointed out that a delay in adjudicating the issue would only result in some "uncertainty" concerning the ultimate extent of petitioners' rights but would not impose a "hardship" on them (Pet. App. 13a-14a) under *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 153 (1967).

In addition, the Special Court rejected petitioners' argument that the Secretary had exceeded her statutory authority to arrange for "the sale of the interest of the United States in the common stock of [Conrail]" (45 U.S.C. 761(a)(1) and (2)) by negotiating for the sale of the ESOP's beneficial interest in the stock (Pet. App. 14a-17a). The court emphasized that "the MOI does not purport to sell the ESOP's interest or require conveyance of that interest at any price" (*id.* at 15a), and that "any sale of any Conrail stock to the Norfolk Southern is, by the terms of the MOI, expressly conditioned on the enactment of legislation ratifying the proposed sale" (*ibid.*). Thus, the Secretary has played only a "limited role * * * with regard to the ESOP stock" by "a) mak[ing] a commitment to sell the government's interests if 'appropriate arrangements' are made with regard to the ESOP and Congress expressly authorizes the proposed sale to Norfolk Southern; and b) recommend[ing]

that Congress enact legislation to provide for the sale" (*ibid.*). Given this requirement of ratifying legislation, and in view of the Secretary's broad responsibility to oversee transportation matters and make recommendations to Congress (see *id.* at 17a), the court concluded that "the Secretary's limited foray into matters touching on the ESOP's interest [did not] exceed[ ] the Secretary's authority" (*id.* at 16a).[5]

The Special Court also held that petitioners' claim of a conflict of interest on the part of the Secretary did not entitle them to appointment of an independent trustee to represent the interest of the ESOP in any proceeding concerning the sale of Conrail (Pet. App. 18a-22a). Relying on 45 U.S.C. 726(f),[6] the court concluded that "the statutory

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[5]The court specifically did not decide "whether the Secretary would exceed her statutory authority by conveying the ESOP's interests in Conrail in the absence of legislation addressing this issue," noting that petitioners "concede that th[is] * * * issue is not yet ripe" (Pet. App. 17a-18a n.14).

[6]The legislation providing for the creation of the Conrail ESOP required Conrail to submit a written plan to Congress within one year of enactment to exempt those associated with the ESOP from "any fiduciary duty, responsibility or liability for the acquisition of, investment in, or retention of any security or interest therein of [Conrail] or for any other transaction contemplated by this subsection." United States Railway Association Amendments Act of 1978, Pub. L. No. 95-565, § 3, 92 Stat. 2399, codified at 45 U.S.C. 726(f)(5)(A). In 1980, Congress passed such a limitation of liability by adding Subsection (8)(A) to Section 216(f) of the 3R Act. See Pub. L. No. 96-254, § 118(c), 94 Stat. 406; see also H.R. Conf. Rep. 96-1041, 96th Cong., 2d Sess. 30-32 (1980). In pertinent part, that Section provides that no ESOP manager

> shall have or be subject to any fiduciary responsibility, obligation, or duty, nor shall any such person be subject to civil liability, under any Federal or State law, as a fiduciary or otherwise—
>
> > (i) in connection with the employee stock ownership plan and related trust established by [Conrail] pursuant to the requirements of this subsection or with ConRail Equity Corporation * * * on account of any reorganization or restructuring

scheme suggests that Congress foresaw that officials charged with responsibility for the ESOP might face claims of conflict of interest in connection with a sale of Conrail, such as the claims raised in this action, * * * [and] deliberately chose not to make these officials accountable to Conrail ESOP beneficiaries for any breach of fiduciary duties 'under any federal or state law' " (Pet. App. 20a-21a (footnote omitted)). In light of this statutory scheme, to accept petitioners' argument for an independent trustee "would go beyond construction or interpretation and require that this [c]ourt completely rewrite statutes enacted by Congress" (*id.* at 21a-22a (footnote omitted)).

ARGUMENT

The decision of the Special Court is correct and does not conflict with any decision of this Court. Accordingly, further review is not warranted.

1. Petitioners contend (Pet. 22-27) that by including in the MOI a provision concerning the sale of the ESOP's beneficial interest in Conrail, the Secretary exceeded her statutory authority to arrange and submit a plan to Congress for the sale "of the interest of the United States in the common stock of [Conrail]." 45 U.S.C. 761(a)(1) and (2). However, as the Special Court explained, "the MOI does not purport to sell the ESOP's interest or require conveyance of that interest at any price" (Pet. App. 15a; see also *id.*

> of [Conrail], its successors or assigns, or their assets or capital structure * * *;
>
> (ii) for or in connection with * * * the disposition of any * * * security [of Conrail or ConRail Equity Corporation] to the extent that such disposition is made in connection with a reorganization or restructuring of [Conrail], its successors and assigns, or their assets or capital structure, as directed or approved by * * * the United States * * *.

45 U.S.C. 726(f)(8)(A), (i), and (ii); Pet. App. 21a.

at 11a n.10). Rather, the MOI merely reflects "a commitment to sell the government's interests if 'appropriate arrangements' are made with regard to the ESOP" (*id.* at 15a)—arrangements that are not specified in the MOI but are left open for future determination. Moreover, the MOI expressly requires that Congress, which originally authorized the establishment of the ESOP, approve the proposed sale by enacting legislation that provides, inter alia, "a mechanism for definitively valuing the [ESOP]" (S. Rep. 99-98, *supra,* at 104).

Especially in light of the Secretary's broad responsibility to make recommendations to Congress on transportation matters,[7] the MOI's limited and provisional reference to the ESOP, which is of no effect unless and until ratified by Act of Congress, is not beyond the Secretary's authority. Petitioners' real complaint is directed to the manner in which *Congress* may deal with the ESOP's interest if it enacts *future* legislation authorizing the proposed sale.[8] Their arguments on this matter should be addressed to the legislature, not to the courts.

2. Expressing concern that the proposed sale to Norfolk Southern may not adequately compensate the ESOP for its beneficial interest in Conrail, petitioners seek (Pet. 27-34) a

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[7]See 49 U.S.C. 301:

> The Secretary of Transportation shall—
>
> (1) under the direction of the President, exercise leadership in transportation matters * * *;
>
> (2) provide leadership in the development of transportation policies and programs, and make recommendations to the President and Congress for their consideration and implementation[.]

[8]Indeed, to the extent that petitioners' objection concerns treatment of the ESOP beneficiaries by Congress in legislation that has not yet been enacted, it is not justiciable in this suit. Cf. *Hodel* v. *Virginia Surface Mining & Reclamation Association,* 452 U.S. 264, 294-295 (1981).

determination at this time that they will have a remedy against the United States pursuant to the Tucker Act, 28 U.S.C. 1491, in the event of such under-compensation. The Special Court correctly held that this issue is not ripe for adjudication. Given that the MOI is merely an initial step in the process of negotiation and sale and that Congress has not yet adopted legislation to approve the proposed transaction or fix the mechanism for valuing the ESOP, petitioners' claim is plainly premature.[9]

Nor, contrary to petitioners' assertion, is this case analogous to *Dames & Moore* v. *Regan,* 453 U.S. 654 (1981),[10]

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[9]Congress has not even begun to consider the mechanism for valuation of the ESOP's interest or the nature of any legislative protections it may wish to afford to the ESOP beneficiaries. Indeed, in the committee report accompanying the bill to approve the proposed sale to Norfolk Southern, the Senate Committee on Commerce, Science and Transportation noted that the legislation does not contain a specific mechanism for valuing the ESOP and therefore "it will be necessary to offer an amendment containing such a mechanism when [the bill] is considered by the full Senate." S. Rep. 99-98, *supra,* at 41. The Senate report also states that "[r]egardless of the valuation mechanism ultimately selected, the Committee intends to assure that all ESOP participants receive just compensation for their interests and that this compensation is available as soon as feasible after the date of enactment" (*ibid.*). As of this date, the full Senate has not yet taken up the bill, nor has the responsible House committee begun to consider legislation to approve the proposed sale.

[10]In *Dames & Moore* v. *Regan,* this Court sustained a presidential Executive Order implementing the agreement between Iran and the United States for freeing American hostages held in Iran and releasing certain Iranian assets frozen in the United States. That Executive Order "suspended" all claims by United States nationals pending in American courts against Iran and provided for the presentation of such claims to an Iranian-United States Claims Tribunal. 453 U.S. at 666. The petitioner in that case had obtained a judgment against Iranian defendants and had sought relief both by prejudgment attachment and execution on the judgment against the defendants. In upholding the Executive Order "suspending" petitioner's claim, this Court held that, although the issue of whether the suspension would constitute a taking of property in violation of the Fifth Amendment was not yet ripe for review,

and the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974).[11] In contrast to those cases, at this point there has been no final and binding governmental action, like the suspension order in *Dames & Moore* or the compelled continuation of unprofitable service in *Regional Rail*, that could have an adverse effect on petitioners' legal rights. In the absence of such governmental action that could give rise to a Tucker Act remedy, the issue is not ripe for resolution by the courts. And nothing in this Court's decisions establishes the expansive proposition, on which petitioners rest (Pet. 33), that "if a course of events may lead to a taking of private property, the right to compensation is presently

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"this contention, and the possibility that the President's actions [under the Executive Order] may effect a taking of petitioner's property, make ripe for adjudication the question whether petitioner will have a remedy at law in the Court of Claims under the Tucker Act." 453 U.S. at 689, citing *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-125 (1974). Since the government conceded that there was no statutory bar to petitioner's taking claim before the Court of Claims, this Court stated that it saw "no jurisdictional obstacle to an appropriate action * * * under the Tucker Act." 453 U.S. at 689-690.

[11]In the *Regional Rail Reorganization Act Cases*, this Court held that the Tucker Act was available to provide a remedy for a "taking" arising from the "erosion" in value of the assets of the Penn Central estate as a result of the statutorily-required continuation of rail operations pending implementation of the "final system plan" (which resulted in the formation of Conrail) under the 3R Act. 419 U.S. at 125-136. See note 3, *supra*. In so ruling, this Court recognized that the "compelled continued rail operations under * * * conditions [of further losses] * * * may accelerate erosion of the interests of plaintiffs" and therefore "failure to decide the availability of the Tucker Act would raise the distinct possibility that * * * plaintiffs would suffer an 'erosion taking' without adequate assurance that compensation will ever be provided." Such a result, the Court concluded, would violate the rule that "there must be at the time of taking 'reasonable, certain and adequate provision for obtaining compensation.' " 419 U.S. at 124-125 (footnote omitted) (quoting *Cherokee Nation* v. *Southern Kan. Ry.*, 135 U.S. 641, 659 (1890)).

justiciable." Petitioners' attempt to litigate over "the potential adoption of an act of Congress" (Pet. 33-34) is accordingly not justiciable.[12]

3. Petitioners lastly contend (Pet. 34-47) that the Secretary has a conflict of interest with respect to the Conrail ESOP and therefore that the Special Court should have appointed an independent representative to protect the interest of the ESOP beneficiaries. As petitioners concede (Pet. 42), however, this argument is premised on their assertion that the Secretary in negotiating the MOI "has arrogated to herself unauthorized authority over the ESOP stock." For the reasons discussed above, the Secretary has not exercised such "unauthorized authority" with respect to the ESOP, and thus the basis of petitioners' argument is incorrect.

In any event, as petitioners acknowledge (Pet. 34), Congress, in enacting the statute under which the ESOP was established, explicitly exempted "any * * * person" associated with management of the ESOP from "any fiduciary responsibility, obligation, or duty * * * in connection with the employee stock ownership plan * * * on account of any reorganization or restructuring of [Conrail] * * * [or] disposition of any [Conrail] security to the extent that such disposition is made in connection with a reorganization or restructuring of [Conrail] * * * as directed or approved by * * * the United States." 45 U.S.C. 726(f)(8)(A), (i), and (ii). This language is clearly controlling here, as the Special

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[12]If, instead of the MOI, a bill had been introduced in Congress to authorize the sale of Conrail to Norfolk Southern, that action would not create a justiciable controversy over the potential right of the ESOP beneficiaries to a Tucker Act claim against the United States. In substance, the MOI negotiated by the Secretary and proposed to Congress is no different; like the introduction of a bill, it does not present a ripe issue.

Court recognized (Pet. App. 20a-21a), and petitioners' attempted construction to the contrary is unavailing; "[t]o conclude otherwise would go beyond construction or interpretation and require that th[e] [c]ourt completely rewrite statutes enacted by Congress" (*id.* at 21a-22a (footnote omitted)).[13] Nor is there any basis for petitioners' sweeping assertion (Pet. 36), notwithstanding this provision, of an "inherent equitable power [in] any American court to correct manifest injustice."[14]

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[13]Petitioners' assertion (Pet. 41 & n.2) that the Special Court's ruling "removed all power from any Court" to control the actions of the ESOP managers (including thefts of cash from the ESOP) is patently incorrect. Congress, in absolving the ESOP managers from potential fiduciary liability in connection with the future restructuring or reorganization of Conrail, explicitly did not relieve such persons from fiduciary liability in connection with the normal custodial responsibilities associated with administration and management of the ESOP. See 45 U.S.C. 726(f)(8)(B).

[14]Petitioners also attempt (Pet. 43-46) to analogize this case to *Kaufman* v. *Societe Internationale*, 343 U.S. 156 (1952). *Kaufman* is clearly distinguishable, however. That case, arising under the Trading with the Enemy Act, 50 U.S.C. App. 5(b), involved the government's seizure of assets of a neutral corporation controlled by enemy aliens. The questions presented were whether the proportionate rights of non-enemy stockholders were to be protected and whether those stockholders should be allowed to intervene in the lawsuit pursuant to Fed. R. Civ. P. 24. In this case, by contrast, there has been no seizure or other taking of the ESOP's beneficial interest, and the Court's decision in *Kaufman* in no way suggests that the various rail statutes entitle petitioners to the appointment of an independent representative.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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